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NV Bina Sdn Bhd v Magna Park Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-256–03 OF 2013
AZIZUL AZMI ADNAN JC
5 DECEMBER 2014

C *Contract — Letter of undertaking — Breach — Plaintiff awarded with sub-subcontract — Letter of undertaking provides for direct payment by defendant — Two other letters issued by defendant — Defendant alleged letters displaced its duty under letter of undertaking — Main contractor and subcontractor commenced arbitral proceedings — Whether arbitrator's decision affect current* D *action — Whether letters displaced letter of undertaking*

The defendant was the owner and developer of a construction project located at Jalan Kepong. The defendant awarded the project to an unincorporated joint venture between the defendant and Perembun (M) Sdn Bhd known as E MPC-Perembun JV ('the MPC-Perembun JV') as the main contractor. The JV then awarded the project to Bina BMK Sdn Bhd ('Bina BMK') as the main subcontractor which in turn appointed the plaintiff as the sub-subcontractor to undertake the main building works for the project. The defendant then issued a letter of undertaking dated 1 September 2005 which provide that payments F due under the sub-subcontract to the plaintiff were to be made directly to the defendant. Subsequently, two letters dated 13 October 2006 and 12 December 2006 were issued by the defendant. The defendant contended that these two letters displaced its duty to make direct payments under the letter of undertaking. Some of the payments were made to the plaintiff, however a sum G of RM6,041,934.56 remained outstanding including the 2.5% retained contract sum. Arbitral proceedings had been commenced between the main contractor and the subcontractor; nevertheless, neither the plaintiff nor the defendant was a party to the action. At the end of the proceedings, the arbitrator found that the letter of undertaking was invalid and ineffective H because: (a) there was economic duress on Bina BMK, thus there was no consent to form the basis of an agreement; (b) there was no consideration flowing between the plaintiff and the defendant; and (c) there was no privity between the plaintiff and the defendant. The plaintiff brought the present action to claim for the balance outstanding sum. The defendant submitted that I the court should not reach into a decision that contradicts the findings of the arbitrator based on the principle of res judicata. Further, it was argued that the invoices which contained an endorsement stating 'Payment on behalf MPC Perembun JV' showed that their obligation to make direct payments had passed to the JV. The defendant further argued that unlike cl 6 in the 13

October 2006 letter, cl 6 in the 12 December 2006 letter was not expressed to supersede all prior verbal agreements. The defendant also submitted that, even if the letter of undertaking was valid, it did not cover the second moiety 2.5% retention sum. The defendant further submitted that as the amount of award given by the arbitrator included the amounts claimed by the plaintiff, the plaintiff ought not to succeed in the present action.

Held, allowing the plaintiff's claim:

(1) The arbitration proceedings between different parties ought not to have any bearing whatsoever on the present action unless there was compelling circumstances. The court disagreed with the arbitrator's finding that there was no benefit conferred on the employer and detriment suffered by the promisee. It was clear that the defendant would obtain a benefit in the plaintiff performing its obligations under the sub-subcontract. Further, under the Contract Act 1950, consideration need not flow from the promisee. There was also fundamental misunderstanding on the concept of privity by the arbitrator when the arbitrator held that there was no privity between the plaintiff as sub-subcontractor and the defendant as employer. The very purpose of the letter of undertaking was to create privity between the parties, thus, privity existed precisely because the parties had executed the letter. The court was therefore ought not to be bound by the finding of the arbitrator because such finding was not grounded on a proper understanding of the law (see paras 15, 17 & 19–22).

(2) The court was of the view that the obligation of the appellant in the letter of undertaking had not been displaced or supplanted by the 13 October 2006 letter because the MPC- Perembun JV was not a signatory to the 13 October 2006 letter. Even if the MPC-Perembun JV was privity to the letter, cl 6 of the letter only superseded all prior verbal agreements and not the written agreement in the letter of undertaking. Further, the letter merely put into effect that which had been agreed in the letter of undertaking. The facts that the defendant had continued to pay direct payments to the plaintiff for four occasions after the issuance of the 13 October 2006 letter showed that letter of undertaking was meant to be unimpaired by the said letter (see para 25(a)–(d)).

(3) The evidentiary value of the endorsement in the invoices would not be significant for the purposes of a proper construction of the letter of 13 October 2006. Furthermore, there was no evidence showing whether the invoices issued prior to 13 October 2006 contained the same endorsement of particulars (see para 29).

(4) It was clear that the parties had intended to incorporate into the letter dated 12 December 2006 the position agreed in the 13 October 2006 letter, which was that all prior verbal agreements were to have been

superseded. However the drafts person made a transcription error when attempting to incorporate the manuscript amendment in the 13 October 2006 letter, by inserting the word 'verbal' one line above where it ought to have appeared (see para 33).

(5) There was no mention in the letter of undertaking about the exclusion of the second moiety 2.5% retention sum. There was also uncontroverted evidence before the court that the defects liability period had in fact expired on 10 June 2009. Accordingly, the moiety 2.5% retention sum had been due and payable by the defendant under the letter of undertaking since 10 June 2009 (see paras 37 & 39).

[Bahasa Malaysia summary

Defendan adalah pemilik dan pemaju projek pembinaan yang terletak di Jalan Kepong. Defendan mengawardkan projek kepada usaha sama yang tidak diperbadankan antara defendan dan Perembun (M) Sdn Bhd yang dikenali sebagai MPC-Perembun JV ('MPC-Perembun JV') sebagai kontraktor utama. JV kemudian mengawardkan projek tersebut kepada Bina BMK Sdn Bhd ('Bina BMK') sebagai subkontraktor utama yang seterusnya melantik plaintif sebagai sub-subkontraktor untuk menjalankan kerja-kerja asas bangunan untuk projek tersebut. Defendan kemudian mengeluarkan satu surat akujanji bertarikh 1 September 2005 yang memperuntukkan bahawa bayaran yang perlu dijelaskan di bawah sub-subkontrak kepada plaintif perlu dibayar secara langsung kepada defendan. Sehubungan dengan itu, dua surat bertarikh 13 Oktober 2006 dan 12 Disember 2006 telah dikeluarkan oleh defendan. Defendan menegaskan bahawa kedua-dua surat tersebut mengalihkan kewajipannya untuk membuat bayaran secara langsung di bawah surat akujanji. Sebahagian daripada bayaran dibuat kepada plaintif, bagaimanapun sejumlah RM6,041,934.56 kekal belum dijelaskan termasuk 2.5% jumlah kontrak tertahan. Prosiding timbang tara telah dimulakan antara kontraktor utama dan subkontraktor; namun, baik plaintif mahupun defendan bukanlah pihak kepada tindakan tersebut. Pada akhir prosiding, penimbang tara mendapati bahawa surat akujanji tidak sah dan tidak boleh dikuatkuasakan kerana: (a) tiada paksaan ekonomi ke atas Bina BMK, oleh itu tiada persetujuan untuk mewujudkan asas kepada perjanjian; (b) tiada pertimbangan yang mengalir di antara plaintif dan defendan; dan (c) tidak terdapat priviti di antara plaintif dan defendan. Plaintif mengemukakan tindakan ini untuk menuntut jumlah baki wang yang belum dijelaskan. Defendan berhujah bahawa mahkamah tidak boleh membuat keputusan yang bercanggah dengan dapatan penimbang tara berdasarkan prinsip res judicata. Seterusnya, defendan berhujah bahawa invois yang mengandungi pengendorsan menyatakan 'Bayaran bagi pihak MPC Perembun JV' menunjukkan bahawa kewajipan mereka untuk membuat bayaran secara langsung telah berpindah kepada JV. Defendan selanjutnya berhujah bahawa tidak seperti klausa 6 dalam surat 13 Oktober 2006, klausa 6 pada surat 12

Disember 2006 tidak menyatakan untuk menggantikan semua perjanjian lisan terdahulu. Defendan juga berhujah bahawa, walaupun surat akujanji tersebut adalah sah, surat tersebut tidak meliputi 'moiety' kedua 2.5% jumlah tertahan. Defendan seterusnya berhujah bahawa memandangkan jumlah award yang diberikan oleh penimbang tara termasuk jumlah yang dituntut oleh plaintif, plaintif tidak sepatutnya berjaya dalam tindakan ini.

Diputuskan, membenarkan tuntutan plaintif:

(1) Prosiding timbang tara antara pihak-pihak yang berlainan sepatutnya tidak mempunyai apa-apa kesan ke atas tindakan ini melainkan terdapat keadaan yang memaksa. Mahkamah tidak bersetuju dengan dapatan penimbang tara bahawa tiada manfaat yang diberikan kepada majikan dan kerugian dialami oleh penerima janji. Adalah jelas bahawa defendan akan mendapat manfaat sekiranya plaintif melaksanakan kewajipannya di bawah sub-subkontrak. Seterusnya, di bawah Akta Kontrak 1950, pertimbangan tidak semestinya mengalir daripada penerima janji. Terdapat juga salah faham asas kepada konsep priviti oleh penimbang tara apabila penimbang tara memutuskan bahawa tiada priviti antara plaintif sebagai sub-subkontraktor dan defendan sebagai majikan. Tujuan sebenar surat akujanji adalah untuk mewujudkan priviti antara pihak-pihak, oleh itu, priviti sememangnya wujud kerana pihak-pihak telah memeterai surat tersebut. Mahkamah dengan itu tidak seharusnya terikat dengan dapatan penimbang tara kerana dapatan tersebut tidak berasaskan kepada pemahaman yang betul tentang undang-undang (lihat perenggan 15, 17 & 19–22).

(2) Mahkamah berpendapat bahawa kewajipan perayu dalam surat akujanji tersebut tidak dipindahkan atau digantikan oleh surat 13 Oktober 2006 kerana MPC-Perembun JV bukanlah penandatangan kepada surat 13 Oktober 2006. Walaupun jika MPC-Perembun JV adalah priviti kepada surat tersebut, klausa 6 surat hanya menggantikan semua perjanjian lisan terdahulu dan bukannya perjanjian bertulis dalam surat akujanji. Selanjutnya, surat tersebut hanyalah untuk menguatkuasakan apa yang telah dipersetujui dalam surat akujanji. Fakta bahawa defendan berterusan membuat bayaran secara langsung kepada plaintif sebanyak empat kali selepas pengeluaran surat 13 Okt 2006 menunjukkan bahawa surat akujanji tersebut bertujuan untuk tidak dijejaskan oleh surat tersebut (lihat perenggan 25(a)–(d)).

(3) Nilai keterangan pengendorsan dalam invois tidak akan menjadi penting untuk tujuan pembinaan yang sesuai dengan surat bertarikh 13 Oktober 2006. Tambahan pula, tiada bukti yang menunjukkan sama ada invois yang dikeluarkan sebelum 13 Oktober 2006 mengandungi butiran pengendorsan yang sama (lihat perenggan 29).

(4) Adalah jelas bahawa pihak-pihak bertujuan untuk memasukkan ke

dalam surat bertarikh 12 Disember 2006 kedudukan yang dipersetujui dalam surat 13 Oktober 2006, bahawa semua perjanjian lisan yang terdahulu telah digantikan. Bagaimanapun penderaf membuat kesilapan transkripsi apabila cuba untuk memasukkan pindaan manuskrip dalam surat 13 Oktober 2006, dengan memasukkan perkataan 'verbal' satu baris di atas di mana perkataan tersebut sepatutnya timbul (lihat perenggan 33).

(5) Tidak disebut dalam surat akujanji mengenai pengecualian daripada 'moiety' kedua 2.5% jumlah tertahan. Terdapat juga bukti yang tidak dipertikaikan di mahkamah bahawa tempoh liabiliti kecacatan tersebut sebenarnya tamat pada 10 Jun 2009. Sehubungan dengan itu, 'moiety' 2.5% jumlah tertahan yang belum dijelaskan dan dibayar oleh defendan di bawah surat akujanji sejak 10 Jun 2009 (lihat perenggan 37 & 39).]

Notes

For cases on breach, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5948–5951.

Cases referred to

Dr Aishah Tul Radziah bt L Hussin v Dr Suresh a/l Kumarasamy & Ors [2014] 11 MLJ 702; [2014] 1 LNS 512, HC (distd)

James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796, HL (refd)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)

Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor [2010] 4 MLJ 157; [2010] 8 CLJ 49, CA (refd)

Legislation referred to

Contracts Act 1950

Lee Chan Leong (Siew Ee Mei with him) (Chan Leong & Co) for the plantiff.
Rishwant Singh (Satharuban Sivasubramaniam, Ranjini and Anne Sangheetha with him) (Satha & Co) for the defendant.

Azizul Azmi Adnan JC:

INTRODUCTION

[1] The plaintiff, NV Bina Sdn Bhd, was a sub-subcontractor for a mixed development project involving the construction of apartments and shops located on Jalan Kepong. The defendant, Magna Park Sdn Bhd, was the developer and owner of the project. The plaintiff sued the defendant for certain progress payments due to the plaintiff in respect of the project. The plaintiff's case was founded on a letter of undertaking dated 1 September 2005 ('the letter of undertaking') from the defendant and addressed to the plaintiff, by which

the defendant had irrevocably undertaken to make direct payments to the plaintiff in respect of the subcontract works performed by the plaintiff. A

FACTS

[2] The defendant, as employer, awarded the project to an unincorporated joint venture known as MPC-Perembun JV, comprising an associated company of the defendant, Magna Prima Construction Sdn Bhd, and Perembun (M) Sdn Bhd MPC-Perembun JV, as the main contractor, in turn awarded the project to Bina BMK Sdn Bhd ('Bina BMK') as the main subcontractor. B C

[3] By a letter of acceptance of award dated 18 April 2005, Bina BMK Sdn Bhd appointed the plaintiff as the sub-subcontractor to undertake the main building works for the project. D

[4] As mentioned above, on 1 September 2005, the defendant issued the letter of undertaking to the plaintiff, which letter was countersigned by MPC-Perembun JV, Bina BMK and the plaintiff. The principal purpose of the letter of undertaking was to provide that payments due under the sub-subcontract to the plaintiff were to be made directly by the defendant, as employer of the project. E

[5] There were two subsequent letters issued by the defendant and counter-signed by the plaintiff, dated 13 October 2006 and 12 December 2006. The effect of these letters, in particular on the arrangement for direct payment established pursuant to the letter of undertaking, forms the crux of the dispute between the parties. The defendant's position is that these subsequent letters displaced its obligation to make direct payments under the letter of undertaking. Neither of these subsequent letters were signed by MPC-Perembun JV, an important point discussed further below. F G

[6] The certificate of practical completion for the project was issued on 11 December 2007. The defect liability period for the project expired on 10 June 2009. H

[7] Some payments had been made to the plaintiff under the sub-subcontract and pursuant to the letter of undertaking. However, a sum of RM6,041,934.56 remains outstanding, which includes RM1,158,015.22, being 2.5% of the contract sum being retained until expiry of the defect liability period. I

[8] Arbitral proceedings had been commenced between the main contractor, MPC-Perembun JV, and Bina BMK, the main sub-contractor. Bina

BMK claimed for amounts due to it under the terms of the subcontract entered between them. The arbitrator issued a final award on 21 April 2014. Neither the plaintiff nor the defendant was a party to the arbitration.

[9] In his final award, the arbitrator came to a finding that the letter of undertaking was invalid and ineffective and did not bind Bina BMK on the following grounds:

(a) there was economic duress on the claimant, Bina BMK, and therefore there was no consent to form the basis of an agreement;

(b) there was no consideration flowing from NV Bina Sdn Bhd (the subcontractor and plaintiff in this action) to Magna Park Sdn Bhd (the employer and defendant in the instant case); and

(c) there was no privity between the plaintiff and the defendant.

[10] The defendant's counsel urged that this court should not come to a finding that contradicts the findings of the arbitrator based on the principle of res judicata, and therefore there ought to be a finding that the letter of undertaking is void and that the defendant has no obligation to make the direct payments in respect of the amounts outstanding for the works performed by the plaintiff.

FINDINGS AND DECISION

[11] This court finds that:

(a) the letter of undertaking is not void, and remains binding on the defendant;

(b) neither the 13 October 2006 letter nor the 12 December 2006 letter superseded the letter of undertaking to displace the direct payment obligation of the defendant to the plaintiff; and

(c) the terms of the letter of undertaking covers the second moiety 2.5% retention sum.

[12] There is judgment as follows:

(a) the defendant is to pay to the plaintiff the amount of RM6,041,934.55;

(b) the defendant is to pay to the plaintiff pre-judgment interest at a rate of 4%pa:

(i) on the amount of RM4,883,919.35 from 5 June 2008–5 December 2014; and

(ii) on the amount of RM1,158,015.20 from 10 June 2009–5 December 2014.

(c) the defendant is to pay to the plaintiff post-judgment interest at a rate of 5%pa on the sums referred to in sub-paras (a) and (b) ante from 6 December 2014 until full satisfaction of the judgment debt; and

(d) the defendant to pay the plaintiff costs of RM15,000.

[13] The bases of the decision and findings this court are set out in the following paragraphs.

Analysis

The enforceability of the letter of undertaking

[14] The first observation in connection with the letter of undertaking is that, even if the letter of undertaking is unenforceable as between Bina BMK and MPC-Perembun JV, it does not mean that the letter of undertaking is unenforceable as between the parties to the present proceedings.

[15] In the ordinary case, arbitration proceedings between different parties ought not have any bearing whatsoever on the proceedings before this court. The counsel for the defendant, however, argued that issue estoppel should nonetheless apply as between the defendant and the plaintiff on the authority of *Dr Aishah Tul Radziah bt L Hussin v Dr Suresh a/l Kumarasamy & Ors* [2014] 11 MLJ 702; [2014] 1 LNS 512, where it was held that, in exceptional circumstances, res judicata could still operate even where the parties to the previous proceedings were different.

[16] The learned judge in that case held that:

> In my view, certain compelling circumstances may warrant a departure from the requirement for privity of interest where to insist on it may be unfair or oppressive or may even constitute an abuse of process.

[17] I find that no such compelling circumstances exist in the present instance. *Dr Aishah Tul* can be distinguished on the basis that the plaintiff in that action had the opportunity to join the defendants in the previous proceedings, where the plaintiff was a defendant. The plaintiff in that case had not done so.

[18] In the present case, it was not open to the plaintiff to join the defendant in the arbitral proceedings, as the plaintiff was not a party to the arbitration

between the main contractor and the main subcontractor. In any event, arbitral proceedings have their basis in contract, and there is no arbitration agreement between the present parties.

[19] In the final award, the arbitrator made a finding that he was 'unable to see any benefit conferred on the promisor, the Employer or detriment suffered by the promisee, NV Bina'. I have to respectfully disagree on the first point, as clearly the employer would obtain a benefit in the plaintiff performing its obligations under the sub-subcontract.

[20] On the second point, the fact that no consideration flowed from promisee is immaterial. The position in Malaysia under the Contracts Act 1950 – distinct from the common law position – is that consideration need not flow from the promisee; it suffices that any one party provides the consideration for there to be a valid contract: see the decision of the Judicial Committee of the Privy Council in *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170. The promise by the defendant to make direct payments, and the benefit conferred on Bina BMK by reason of being relieved of the obligation to make the same payments, should very clearly provide the requisite consideration.

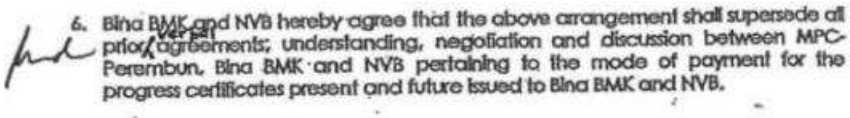
[21] In addition, the arbitrator also held that there was no privity between the plaintiff as a sub-subcontractor and the defendant as employer. This is a fundamental misunderstanding of the concept of privity, as the very purpose of the letter of undertaking was to create privity between the parties. Privity exists precisely because the parties to the letter of undertaking have executed it.

[22] In the light of the foregoing, I am unable to agree with the proposition by the counsel for the defendant that this court ought be bound by the finding of the arbitrator that the letter of undertaking is void, as I am of the view that this finding is not grounded in a proper understanding or application of the law.

The letter of 13 October 2006

[23] Counsel for the defendant argued that the 13 October 2006 letter superseded the letter of undertaking with the effect that the defendant's obligation to make direct payments to the plaintiff has been taken over by MPC-Perembun JV.

[24] The material provision is cl 6 of the letter, reproduced below:


6. Bina BMK and NVB hereby agree that the above arrangement shall supersede all verbal prior agreements, understanding, negotiation and discussion between MPC-Perembun, Bina BMK and NVB pertaining to the mode of payment for the progress certificates present and future issued to Bina BMK and NVB.

[25] I find that the obligation of the defendant in the letter of undertaking has not been supplanted or displaced by the 13 October 2006 letter for the following reasons:

(a) counsel for the defendant contended that the purpose of the letter was to place the obligation to make direct payments on MPC-Perembun JV. The problem with this contention – and it is a fundamental problem – is that MPC-Perembun JV is not a signatory to the 13 October 2006 letter. Accordingly, the letter is necessarily ineffective to achieve its aim;

(b) assuming for the moment that, privity aside, the letter can still be effective to estop the parties from denying its purported effect, cl 6 merely supersedes all prior verbal agreements, understandings, negotiation and discussions between the relevant parties. It was not expressed to supersede the written agreement contained in the letter of undertaking. It must not be forgotten that the letter of undertaking was expressed to be irrevocable. Even though parties can still agree to modify the terms of the prior agreement, the fact that the letter of undertaking was expressed to be irrevocable suggests to me that there must be clear and unequivocal language contained in the subsequent 13 October 2006 letter before a court can come to the conclusion that the undertaking in the letter of undertaking has been abrogated;

(c) thirdly, and this was the contention of the counsel for the plaintiff, cl 6 of the 13 October 2006 letter merely provided that the arrangement spelt out in that letter superseded prior verbal agreements relating to the mode of payment. The 13 October 2006 letter does not displace the obligation of the defendant, but merely puts into effect that which had been agreed in the letter of undertaking. As Dato' Lee, the counsel for the plaintiff had put it, the wordings in cl 6 was meant to be declaratory of what the parties had agreed in the letter of undertaking, and was meant to facilitate the performance of the defendant's undertaking; and

(d) the fact that the defendant's obligation under the letter of undertaking was intended to have remained unimpaired by the 13 October 2006 letter can be supported by the fact that the defendant had continued to pay direct payments to the plaintiff for four occasions after the issuance of the 13 October 2006 letter.

[26] The counsel for the defendant pointed out in respect of this last point that the relevant invoices issued by the defendant contained an endorsement stating 'Payment on behalf MPC Perembun JV'. This, he argued, showed that the principal obligation to make the direct payments had passed on to MPC-Perembun JV.

[27] On the issue of construction of a contract and the conduct of the parties subsequent to the execution of the contract, Reid LJ in the House of Lords case of *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796 said:

> I must say that I had thought that it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

[28] This passage has been cited with approval in Malaysia by the Court of Appeal: see *Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor* [2010] 4 MLJ 157; [2010] 8 CLJ 49.

[29] Accordingly, the evidentiary value of the endorsement in the invoices would not be significant for the purposes of a proper construction of the letter of 13 October 2006, based on the principle applied in *Semenda*. Moreover, there is no evidence before this court showing whether the invoices issued prior to 13 October 2006 contained the same endorsement of particulars.

The letter of 12 December 2006

[30] The defendant issued an almost identically worded letter on 12 December 2006, this time addressed to Bina BMK and the plaintiff, but countersigned by the plaintiff and Bond M&E (KL) Sdn Bhd, a subcontractor of the plaintiff.

[31] Counsel for the defendant also argued that this letter showed that the direct payment obligation has been superseded and displaced. The relevant item 6 of this letter is set out below:

> 6. Bina BMK and NVB verbal hereby agree that the above arrangement shall supersede all prior agreements, understanding, negotiation and discussion between MPC-Perembun, Bina BMK and NVB pertaining to the mode of payment for the progress certificates present and future issued to Bina BMK and NVB.

[32] The counsel for the defendant argued that, unlike cl 6 in the 13 October 2006 letter, this letter was not expressed to supersede all prior verbal agreements.

[33] However, a close examination of this letter will reveal a transcription error, where the word 'verbal' appears in the first line of cl 6 in the 12 December 2006 letter. It is clear to me that the parties had intended to incorporate into this letter the position agreed in the 13 October 2006 letter, which is that all prior verbal agreements were to have been superseded. However the draftsperson made a transcription error when attempting to incorporate the manuscript amendment in the 13 October 2006 letter, by inserting the word 'verbal' one line above where it ought to have appeared.

[34] I also accept the argument of counsel for the plaintiff, which is that, if the 13 October 2006 letter had superseded the direct payment arrangements, then there would not have been any need to issue a similarly worded letter on 12 December 2006.

[35] Therefore I conclude that neither the 13 October 2006 letter nor the 12 December 2006 letter had the effect of extinguishing or displacing the obligation of the defendant to make direct payments to the plaintiff.

Whether the letter of undertaking covers the second moiety

[36] The counsel for the defendant argued that the letter of undertaking, even if valid, did not cover the second moiety 2.5% retention sum.

[37] I am unable to agree with his contention. The plain words of the letter of undertaking is clear. The defendant, as employer, had given an irrevocable undertaking to make direct payment 'for the above mentioned sub-subcontract works'. I take this to mean all payments to be made pursuant to the sub-subcontract will have to be made by the defendant. There are no words in the letter of the undertaking that can be construed as excluding the amount of the second moiety 2.5% retention sum.

[38] It is clear that a retention sum is money that has already been earned by a contractor by the performance of works or the supply of goods. All that remains for this contingent payment obligation to accrue and crystallise is for the defects liability period to lapse.

[39] There is uncontroverted evidence before this court that the defects liability period had in fact expired on 10 June 2009. Accordingly, I find that the moiety 2.5% retention sum has been due and payable by the defendant under the letter of undertaking since 10 June 2009.

Multiplicity of claims

[40] The counsel for the defendant argued that, because Bina BMK had obtained a final award in its arbitration proceedings against MPC-Perembun JV, and because the amount of the award includes the amounts claimed by the plaintiff against the defendant in this action, the plaintiff ought not succeed in this action. Counsel for the defendant is effectively asking this court to be bound by the decision of the arbitrator in his final award of 21 April 2014.

[41] I am unable to accede to counsel's request, due to the reservations that I have on the correctness of the decision of the arbitrator as it pertains to the construction of the letter of undertaking. The defendant could have, in these proceedings, chosen to join the main contractor and the main subcontractor as parties, but did not do so. Even so, MPC-Perembun JV is still not without remedy, as it will have the opportunity to seek restitution from Bina BMK in respect of such amount of the arbitral award that relates to the works performed by the plaintiff.

[42] For the reasons set out above, I allow the plaintiff's claim on the terms set out in para 12 *ante*.

Plaintiff's claim allowed.

Reported by Dzulqarnain Ab Fatar